

The Fifth Amendment Privilege and Collective Entities

I. INTRODUCTION

The application of the fifth amendment privilege against self-incrimination to the documents of collective entities¹ is an issue that is currently generating a great deal of confusion in the federal courts. This confusion is the result of uncertainty regarding the application of the Supreme Court's decisions in *Fisher v. United States*² and *United States v. Doe*³ to the documents of collective entities. In these cases, the Court held that an individual can assert the fifth amendment privilege to avoid turning over business documents demanded by a subpoena if the "act of producing" the subpoenaed documents is sufficiently testimonial and incriminating.⁴ In both *Fisher* and *Doe*, however, the documents subpoenaed were those of an individual or sole-proprietorship. Neither case involved the documents of collective entities.

This latter point is significant because, despite the decisions in *Fisher* and *Doe*, the application of the fifth amendment privilege to the documents of collective entities has been firmly established in a line of Supreme Court cases culminating with *Bellis v. United States*.⁵ These cases hold that a collective entity does not have a fifth amendment privilege,⁶ and that the representative of such an entity cannot assert his or her own privilege to avoid turning over the entity's documents,⁷ even if the documents would incriminate the representative personally.⁸ The Court's rationale for this rule is that the fifth amendment privilege is a personal one and thus may only be invoked by an individual acting in a personal, as opposed to a representative, capacity.⁹ Further, the Court points out that in order for the government to effectively monitor the affairs of business entities, particularly those with economic influence, access to the entity's records must predominate over any individual's claim of privilege.¹⁰

Since *Fisher* and *Doe*, most of the federal circuits to consider document production cases where collective entities are involved have continued to adhere to the rule laid out in *Bellis* and the cases preceding it.¹¹ In the view of these courts, the act of production analysis does not apply where the records of a collective entity are

1. A "collective entity" is defined as "an organization which is recognized as an independent entity apart from its individual members." *Bellis v. United States*, 417 U.S. 85, 92 (1974). Examples of collective entities include corporations, partnerships, associations, and labor unions. A sole-proprietorship is not considered to be a collective entity.

2. 425 U.S. 391 (1976).

3. 465 U.S. 605 (1984).

4. *United States v. Doe*, 465 U.S. 605, 612 (1984); *Fisher v. United States*, 425 U.S. 391, 410 (1976).

5. 417 U.S. 85 (1974).

6. See *infra* text accompanying notes 28-104.

7. *Bellis v. United States*, 417 U.S. 85 (1974); *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911).

8. *Bellis v. United States*, 417 U.S. 85, 88 (1974).

9. See *infra* text accompanying notes 85-93.

10. See *infra* text accompanying notes 70-73.

11. See, e.g., *In re Grand Jury Proceedings (Doe)*, No. 86-4922, slip op. (5th Cir. March 31, 1987) (LEXIS, Genfed library, App file); *In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 861 (8th Cir.), cert. dismissed, 107 S. Ct. 918 (1987); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.), cert. denied, 106 S. Ct. 594 (1985); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 943-45 (10th Cir.), cert. denied, 469 U.S. 819 (1984).

involved. Therefore, the representative of such an entity must produce properly subpoenaed documents, and cannot avoid doing so by arguing that the act of production is potentially incriminating.

However, not all circuits share this view. The Third Circuit, for example, has concluded that the act of production analysis applies regardless of the nature of the entity or the type of documents involved.¹² Thus, like the sole-proprietor in *Doe*, the representative of a collective entity can refuse to produce documents if the act of production is sufficiently testimonial and incriminating. And the Second, Fourth, and Eleventh Circuits, while recognizing the validity of *Bellis* and the rule that a collective entity and its representatives cannot generally assert the fifth amendment to avoid producing documents, have applied the act of production analysis in certain circumstances to allow a representative to avoid production.¹³

Until the Supreme Court resolves the uncertainty that has arisen in the wake of *Fisher* and *Doe*,¹⁴ the lower federal courts will be left to grapple with the applicability of those cases to document production issues involving collective entities and their representatives.¹⁵ In the meantime, this Note attempts to deal with some of the uncertainty. Part II will discuss the evolution of the collective entity doctrine in the Supreme Court. Part III will focus on the *Fisher* and *Doe* decisions, and discuss the "act of production" doctrine developed in those cases. Part IV will consider the various approaches that the federal courts of appeals have taken after *Fisher* and *Doe* in document production cases involving collective entities. Finally, Part V will suggest some conclusions and argue that the best approach in these kind of cases is that being used in the Sixth Circuit.

A. Application of the Amendment to Business Documents—*The Boyd Decision*

The United States Supreme Court first dealt with the question of whether the fifth amendment privilege applied to business documents in *Boyd v. United States*.¹⁶ In *Boyd* the Court held that the privilege could be invoked to prevent the compelled production of a partnership invoice which the Government had subpoenaed in the

12. *In re Grand Jury Empanelled*, 773 F.2d 45 (3d Cir. 1985); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985).

13. See, e.g., *In re Grand Jury No. 86-3* (Will Roberts Corp), 816 F.2d 569 (11th Cir. 1987); *United States v. Lang*, 792 F.2d 1235, 1240-41 (4th Cir.), cert. denied, 107 S. Ct. 574 (1986); *United States v. Sancetta*, 788 F.2d 67, 73-74 (2d Cir. 1986); *United States v. Barth*, 745 F.2d 184 (2d Cir. 1984), cert. denied, 470 U.S. 1004 (1985); *In re Grand Jury Subpoena Duces Tecum (Saxon Ind.)*, 722 F.2d 981 (2d Cir. 1983); *In re Katz*, 623 F.2d 122 (2d Cir. 1980).

14. The Supreme Court had granted certiorari this term on a document production case, *In re Grand Jury Subpoena* (85-W-71-5), 784 F.2d 857 (8th Cir.), cert. granted sub nom. See v. United States, 107 S. Ct. 59 (1986). The writ of certiorari, however, was later dismissed pursuant to Supreme Court Rule 53. 107 S. Ct. 918 (1987).

15. An abundance of law review articles and notes have been written, since the *Doe* decision in 1984, on the application of the fifth amendment in document production cases. See, e.g., Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1 (1987); Alito, *Documents and the Privilege Against Self-Incrimination*, 58 U. PITT. L. REV. 27 (1986); Heidt, *The Fifth Amendment Privilege and Documents- Cutting Fisher's Tangled Line*, 49 MO. L. REV. 439, 447 (1984); Note, *Fifth Amendment Privilege for Producing Corporate Records*, 84 MICH. L. REV. 1544 (1986); Note, *Fifth Amendment Privilege and Compelled Production of Corporate Papers After Fisher and Doe*, 54 FORDHAM L. REV. 935 (1986); Note, *United States v. Doe and its Progeny: A Reevaluation of the Fifth Amendment's Application to Custodian's of Corporate Records*, 40 U. MIAMI L. REV. 793 (1986); Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640 (1986).

16. 116 U.S. 616 (1886).

course of a forfeiture investigation. The Court determined that the subpoena in *Boyd* violated both the fourth and fifth amendments, and observed with regard to the fifth amendment that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself."¹⁷

The result in *Boyd* was founded upon the assertion that the documents sought were the "private property" of the two partners.¹⁸ The property rationale¹⁹ underlying *Boyd* inevitably meant that the government could not compel the production of records over which it did not have a proprietary right superior to that of the claimant.²⁰ This rule was later clarified to the extent that the claimant of the privilege, to be successful, must not only *own* the documents sought, but *possess* them as well.²¹ Furthermore, because the Court was focusing on the ownership and possession of documents, there was no need to consider the organizational character of the records sought. Thus, in *Boyd*, the Court did not consider the document's relationship to the business entity involved, a partnership. Rather the controlling factor was that the invoice was the partner's private property.²²

B. *The Exclusion of Corporations and their Representatives from the Amendment's Protection*

The Court's decision in *Boyd* created a broad privilege which could be invoked to prevent any government attempt to obtain a person's private papers. While the decision has been called the "fountainhead of modern analysis of the self-incrimination clause,"²³ many of its specific pronouncements have been substantially

17. *Id.* at 634-35.

18. *Id.* at 624. The Court stressed the unconstitutionality of invading one's "indefeasible right of personal security, personal liberty and private property." *Id.* at 630.

19. The suggestion that "property rights" is the rationale underlying *Boyd* can be found in an article by Professor Robert Heidt. Heidt, *The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line*, 49 Mo. L. Rev. 439, 447 (1984). While Heidt's argument on this point is persuasive, it calls into question dicta in a great many cases that have cited *Boyd* as a case protecting privacy. See, e.g., *Bellis v. United States*, 417 U.S. 85, 87 (1974); *United States v. White*, 322 U.S. 694, 698-99 (1944); *Wilson v. United States*, 221 U.S. 361, 377 (1911). Indeed, many commentators share this "privacy" view of *Boyd*. See, e.g., Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 956 (1977) [hereinafter Note, *Constitutionally Protected Privacy*]; Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 184 (1977); Annot., 48 L. Ed. 2d 852, 862 (1973). Such a reading of *Boyd* probably stems from the broad language employed by the Court to express its conviction that individual rights must be protected. *Boyd v. United States*, 116 U.S. 616, 635 (1911).

Despite the predominance of the privacy view, Professor Heidt argues that the *Boyd* Court had not intended the decision to be seen as protecting the "partner's expectations of privacy." Heidt, *supra*, at 446 n.25. Privacy concerns were not the Supreme Court's focus, Heidt argues, until much later. *Id.* at 442. So while the Court repeatedly referred to the "private" papers of the partners, Heidt contends that the Court only meant that the invoice was the partner's private property. *Id.* at 446. Heidt concludes on this point that, while the two rationales ultimately led to the same results, they reflected different views about the purpose of the self-incrimination privilege, *id.* at 444, and developed at different times. *Id.* at 442.

Although Heidt's article expressly does not deal with the collective entity issue, *id.* at 440 n.1, the framework which it outlines is useful in understanding some of the most significant cases impacting on the collective entity doctrine.

20. *Boyd v. United States*, 116 U.S. 616, 627-28 (1886) (quoting *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066-67 (1765)).

21. *Perlman v. United States*, 247 U.S. 7 (1918); see also Heidt, *supra* note 19, at 447-48.

22. Heidt, *supra* note 19, at 447.

23. *United States v. Davis*, 636 F.2d 1028, 1042 (5th Cir.), cert. denied, 454 U.S. 862 (1981).

eroded over the years.²⁴ The first signs of this erosion occurred for mainly pragmatic reasons in a case involving the documents of a corporation.²⁵ By 1906 the Court had become sensitive to the implications of its property analysis when corporate records were sought. Under that analysis, the government consistently would be prevented from obtaining documents because the corporation would have a proprietary claim superior to that of the government.²⁶ Consequently, government efforts to regulate the corporate entity would be stifled substantially.²⁷

To avoid these negative implications, the Court sought to develop a rationale to distinguish a corporation from an individual for fifth amendment document purposes. This development began in *Hale v. Henkel*.²⁸ In that case a Government subpoena sought to compel Hale, the secretary and treasurer of a corporation under investigation for Sherman Act violations, to produce certain documents for the grand jury.²⁹ Despite a statutory grant of immunity that would protect him from prosecution on the basis of any testimony or evidence that he produced, Hale refused to comply with the subpoena.³⁰ He argued that, while the immunity statute would protect him, it would not protect the corporation of which he was a representative,³¹ and thus assertion of the privilege was justified. Rejecting this argument, the Court held that the fifth amendment privilege is a "purely personal" one that may not be invoked on behalf of a third party,³² even when the person claiming the privilege is the agent of the third party,³³ and even when the third party is a corporation.³⁴

In *Hale* the Court was not forced to decide whether a corporation was a person within the meaning of the fifth amendment.³⁵ The Court did, however, discuss the nature of the corporation as a state-created entity possessed of only those rights granted to it by the state of incorporation.³⁶ In this discussion, the Court observed that there is a clear distinction between an individual and a corporation and that the latter has no right to refuse to produce documents.³⁷ This distinction, the Court said, is founded upon a recognition of the powers of "visitation" retained by the state in creating the corporation,³⁸ powers that enable the state as sovereign to investigate the

24. See, e.g., *United States v. Doe*, 465 U.S. 605, 610 & n.8 (1984); *Fisher v. United States*, 425 U.S. 391, 407 (1976); *Andresen v. Maryland*, 427 U.S. 463, 471-72 (1976). But see, e.g., *Couch v. United States*, 409 U.S. 322, 327 (1973) ("[The fifth amendment] respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation."); *Fisher v. United States*, 425 U.S. 391, 416-17 (1976) (Brennan, J., concurring). For an excellent discussion of this debate, see Note, *Constitutionally Protected Privacy*, *supra* note 19.

25. *Hale v. Henkel*, 201 U.S. 43 (1906).

26. Heidt, *supra* note 19, at 449-50.

27. *Id.*

28. 201 U.S. 43 (1906).

29. *Id.* at 45-46.

30. *Id.* at 66.

31. *Id.* at 69.

32. *Id.* at 69-70.

33. *Id.*

34. *Id.* at 70.

35. *Id.* This fact has caused some commentators to suggest that the court skirted the issue by deciding the case on the basis of the agency relationship. See, e.g., *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1280 (1979)[hereinafter *Developments in the Law*].

36. *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906).

37. *Id.* at 74.

38. *Id.* at 74-75.

corporation's affairs to insure that it is not abusing its authority.³⁹ So while the Court did not decide specifically the status of a corporation for fifth amendment purposes, its discussion of the visitatorial powers strongly suggested what that status would be.

The developments in *Hale* were the first steps in the evolution of the collective entity doctrine. Five years later, in *Wilson v. United States*,⁴⁰ the Court extended and clarified that doctrine. In *Wilson* the Court held that an officer of a corporation could not claim his personal fifth amendment privilege to justify a refusal to produce the corporation's books and records in response to a grand jury subpoena directed to the corporation. This result would apply, the Court held, even if the production of documents would tend to incriminate the officer, and even if the officer and not the corporation was the subject of the grand jury investigation.⁴¹ The Court emphasized that the amendment would protect the officer against the compulsory production of his private books and papers, and would certainly not require him to give oral testimony,⁴² but noted that, with respect to the corporate records, the officer, by assuming their custody had,

accepted the incident obligation to permit inspection.

...
... If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of the law, he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated, . . . if guilty officers could refuse inspection of the records and papers of the corporation.⁴³

In a companion case,⁴⁴ the Court held that the same result would obtain when the subpoena requiring production of the corporate books is directed to the individual corporate officer.⁴⁵

The *Wilson* decision is based on two related conclusions. First, the Court expressly decided that a corporation does not have a fifth amendment privilege,⁴⁶ and thus cannot, on the basis of self-incrimination, lawfully resist a demand for production of corporate records. Specifically, the Court quoted extensively from its discussion in *Hale* of the visitatorial powers, concluding that these powers necessarily reach the corporation's books and records.⁴⁷

The Court's second conclusion was that an individual corporate representative could not assert a personal privilege to retain the corporation's books against any

39. The Court observed that "the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. . . . There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers." *Id.* For a good discussion of the visitatorial powers rationale developed by the Court in *Hale*, see Note, *The Fourth and Fifth Amendments and the Visitatorial Power of Congress Over State Corporations*, 30 COLUM. L. REV. 103, 107-108 (1930)[hereinafter Note, *Visitatorial Powers*].

40. 221 U.S. 361 (1911).

41. *Wilson v. United States*, 221 U.S. 361, 384-85 (1911).

42. *Id.* at 377.

43. *Id.* at 382, 384-85.

44. *Dreier v. United States*, 221 U.S. 394, 400 (1911).

45. *Id.* at 400.

46. *Wilson v. United States*, 221 U.S. 361, 384-85 (1911).

47. *Id.* at 383-85.

demand of the government which the corporation was required to recognize.⁴⁸ Consequently, this involved a waiver theory: By accepting control of a corporation's books or records, the representative has waived any personal fifth amendment privilege with respect to those records.⁴⁹

While courts have consistently relied upon these conclusions as justification for denial of the privilege to corporations and their representatives,⁵⁰ they have been occasionally criticized. Some commentators have argued that the Court was moved primarily by expediency,⁵¹ and that the visitatorial powers rationale was put forth to obscure the Court's actual conclusion that the federal government's regulatory interest denied the corporation a privilege against self-incrimination.⁵² Reliance upon the visitatorial powers for this purpose, these commentators argue, begs the essential question—the extent to which the visitatorial power itself is subject to the privilege.⁵³

Furthermore, some critics view the waiver notion as a convenient justification for the Court's decision that obstacles to the exercise of government power be kept to a minimum in the corporate context.⁵⁴ Since the assertion of a personal privilege by a corporate representative would create a significant obstacle, the Court refused to find a privilege in that context.⁵⁵ Notably, however, there has not been a voluntary waiver by the representative. Rather, the representative is *prohibited* from asserting the privilege when corporate records are sought.⁵⁶ This view ignores, however, the potential indignities that the individual might be forced to suffer in producing a self-incriminatory document,⁵⁷ indignities supposedly guarded against by the fifth amendment.⁵⁸

Despite criticism of the rationales underlying the Court's early collective entity cases, courts continued to adhere to the doctrine when corporate records were sought.⁵⁹ Indeed, the invariable application of the visitatorial powers rationale set out

48. *Id.* at 385.

49. See Note, *Visitatorial Powers*, *supra* note 39, at 106.

50. See Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 701 & nn.65–67 (1951).

51. *Id.* at 704.

52. Note, *The Constitutional Rights of Associations to Assert the Privilege Against Self-Incrimination*, 112 U. PA. L. REV. 394, 396 (1964) [hereinafter Note, *Constitutional Rights of Associations*]. The Note suggests that the laissez-faire atmosphere of the time probably compelled the Court to employ the visitatorial powers doctrine as justification for its conclusion. *Id.*

53. Meltzer, *supra* note 50, at 702. The author also points out that English courts, while recognizing the visitatorial power, had accorded the privilege against self-incrimination to corporations. *Id.*

54. *Id.* at 703.

55. *Wilson v. United States*, 221 U.S. 361, 382 (1911).

56. Note, *Visitatorial Powers*, *supra* note 39, at 106 & n.20. See also Note, *Constitutional Rights of Associations*, *supra* note 52, at 403 & n.74.

57. See *Developments in the Law*, *supra* note 35, at 1282. The common law had allowed a corporate officer to refuse to produce a corporate document that might incriminate the officer. See also Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 S. CAL. L. REV. 60, 65 (1941).

58. Meltzer, *supra* note 50, at 703. See also *Developments in the Law*, *supra* note 35, at 1281–82.

When the Court has considered claims of privilege, not by collective entities, but by individuals closely associated with them, its approach has been clouded by the existence of that association. Rather than distinguishing such cases on the basis of the policies at stake when a natural rather than an artificial person asserts the privilege, the Court has dealt with the fifth amendment claims of corporate functionaries over corporate documents as a problem closely related to the corporation's lack of fifth amendment protection. As a result, the Court's reasoning in these cases has often been confused and unpersuasive.

59. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 726 (1944); *Essgee Co. v. United States*, 262

in *Hale* and *White* resulted in an inflexible rule that no privilege ever applies to corporate documents regardless of the size of the corporation or the nature of the relationship between the corporation and the representative claiming the privilege.⁶⁰ Further, courts refused to yield to the argument that denial of the privilege to the individual representative was contrary to the spirit of the privilege. Instead, the necessity of preserving the government's power to regulate in the corporate sphere was held to predominate over the individual's personal privilege.⁶¹

C. Expansion of the Collective Entity Doctrine to Other Entities

Despite the Court's apparent awareness of the need to facilitate government regulation of economically influential associations,⁶² subsequent decisions were reluctant to expand the *Hale* and *Wilson* results to noncorporate entities.⁶³ A rigid adherence to the visitatorial powers doctrine explained the Court's reluctance to take this step.⁶⁴ Thus, because the visitatorial power is derived from the state's creation of the corporation, it would not exist in these other contexts even though substantial similarities to corporations—including economic impact on society—are present.

The Third Circuit expressed this view in *United States v. White*,⁶⁵ a case involving the documents of a labor union, an unincorporated association. Rejecting any attempt to treat the labor union like a corporation,⁶⁶ the court held that the custodian was entitled to withhold union documents that would incriminate him so long as he was a member of the union.⁶⁷ The Supreme Court, however, disagreed.⁶⁸ In doing so, the Court put to rest any doubt that the principles formulated in the early collective entity cases would be limited to corporations. In an opinion by Justice Murphy, the Court held that the representative of a labor union could not assert a fifth amendment privilege to avoid producing the union's documents, even though the documents would incriminate him.⁶⁹

The *White* Court viewed the early collective entity cases as motivated by an understanding of the government's need to regulate the affairs of economically powerful organizations.⁷⁰ This need would not diminish, the Court observed, simply

U.S. 151 (1923); *Grant v. United States*, 227 U.S. 74 (1913); *Baltimore & O. R.R. v. Interstate Commerce Comm'n*, 221 U.S. 612 (1911); see also Annot., 52 A.L.R.3d 636 (1973).

60. See Note, *Constitutional Rights of Associations*, *supra* note 52, at 411. In fact, in *Grant v. United States*, 227 U.S. 74 (1913), which concerned the records of a dissolved one-person corporation, the Court took *Hale* and *Wilson* to their logical conclusions. Stating that it did not require extended discussion, the Court held that despite the dissolution the documents retained their "essential character" as corporate documents, and thus remained subject to examination when required by competent authority. *Id.* at 80. The Court, therefore, denied application of the privilege to an agent of the corporation's sole shareholder, since the shareholder himself could not have asserted the privilege because of the corporate character of the documents. *Id.* at 79-80.

61. See *supra* note 59.

62. *Wilson v. United States*, 221 U.S. 361, 380 (1911); see also *supra* text accompanying notes 51-61.

63. See e.g., *Brown v. United States*, 276 U.S. 134 (1928); *Corretjer v. Draughon*, 88 F.2d 116 (1st Cir. 1937).

64. See Note, *Constitutional Rights of Associations*, *supra* note 52, at 398.

65. 137 F.2d 24 (3d Cir. 1943).

66. *Id.* at 26.

67. *Id.*

68. *United States v. White*, 322 U.S. 694 (1944).

69. *Id.* at 704.

70. *Id.* at 700.

because the visitatorial power may be lacking as to a particular type of organization.⁷¹ Consequently, while the visitatorial powers doctrine was a "convenient vehicle" to justify the Court's denial of the privilege to corporations, it was not the decisive justification.⁷² Rather, Justice Murphy declared:

[T]he power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.⁷³

Whether an organization and its representatives could invoke this personal privilege depended, the Court argued, upon the nature of the organization and its activities.⁷⁴ Thus, the Court declared:

The test . . . is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.⁷⁵

The Court concluded that the labor union in *White* met the terms of this "impersonality" test.⁷⁶ The scope of the union's activities as well as the size of its membership required that the government be allowed access to its books and records without being obstructed by the fifth amendment claims of the custodian.⁷⁷ Further, no personal privacy interests of the representative were implicated by denying the privilege, because the documents were owned by the union and routinely open to inspection by the individual members.⁷⁸

The impersonality test put forth by the Court in *White* implied that there were entities that would not come within its terms, and that, therefore, the representatives of those entities would be allowed to assert the fifth amendment privilege when the

71. *Id.*

72. *Id.*

73. *Id.* at 700-01.

74. *Id.* at 701. See also Fraser, *The Privilege Against Self-Incrimination as Applied to Custodians of Organizational Records*, 33 WASH. L. REV. 435, 440 (1958).

75. *United States v. White*, 322 U.S. 694, 701 (1944).

76. *Id.*

77. The court stated:

The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.

Id. at 700.

78. The court did not feel privacy interests were implicated because:

Such records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. . . . They therefore embody no element of personal privacy and carry with them no claim of personal privilege.

Id. at 699-700 (citation omitted).

entity's documents were sought.⁷⁹ Notably, however, the *White* test has never been applied to enable a corporate representative to offset the privilege.⁸⁰ Courts have instead continued to rely on both the visitatorial powers analysis, and the principle that a personal privilege may not be invoked by a custodian as to the documents of an entity that is not itself privileged.⁸¹ Furthermore, when the *White* test has been applied to the representatives of other entities—partnerships, for instance—rarely has the privilege been found to exist.⁸² This is certainly not surprising since very few organizations can be said to embody *solely* the private or personal interests of their members,⁸³ but rather will embody some combination of the two.⁸⁴

On the other hand, the Court's emphasis in *White* on the personal nature of the privilege has been consistently relied upon in later decisions involving organizations.⁸⁵ The Court's view is that when an individual acts as the representative of a group, he or she does not exercise personal rights, but rather the rights of the group. Since the group has no fifth amendment privilege as to its documents, the representative will likewise have no privilege, even though production of the group's documents would incriminate the representative personally.⁸⁶

Most recently, in *Bellis v. United States*,⁸⁷ the Court persuasively reaffirmed its commitment to this aspect of the *White* case, and to the collective entity doctrine in general. Indeed, *Bellis* demonstrated how far the Court would be willing to extend that doctrine.⁸⁸

Bellis concerned the partnership documents of a dissolved three-member law firm.⁸⁹ In an eight to one decision,⁹⁰ the Court denied application of the fifth amendment privilege to one of the firm's former partners.⁹¹ Reiterating the basic principles set out in *White*, the Court stated that the privilege functions to protect only

79. See Fraser, *supra* note 74, at 440.

80. See Note, *Constitutional Rights of Associations*, *supra* note 52, at 411 & n.138.

81. See, e.g., *In re Grand Jury Empanelled*, 722 F.2d 294 (6th Cir. 1983), *cert. dismissed*, 465 U.S. 1085 (1984); see generally *infra* text accompanying notes 137–59.

82. *United States v. Silverstein*, 314 F.2d 789, 791 (2d Cir.), *cert denied*, 374 U.S. 807 (1963); *United States v. Onassis*, 125 F. Supp. 190, 205–10 (D.D.C. 1954); *In re Subpoena Duces Tecum*, 81 F. Supp. 418, 421 (N.D. Cal. 1948).

83. See Meltzer, *supra* note 50, at 705; Fraser, *supra* note 74, at 445.

84. *Bellis v. United States*, 417 U.S. 85, 100 (1974); see generally *infra* text accompanying notes 87–101.

85. See, e.g., *McPhaul v. United States*, 364 U.S. 372, 380 (1960) (Civil Rights Congress); *Curcio v. United States*, 354 U.S. 118, 122–23 (1957) (labor union); *Rogers v. United States*, 340 U.S. 367–72 (1951) (Communist Party of Denver); *United States v. Fleischman*, 339 U.S. 349, 357–58 (1950) (Joint Anti-Fascist Refugee Committee); see also Annot., 52 A.L.R.3d 636, 646 (1973).

86. *United States v. White*, 322 U.S. 694, 699 (1944).

87. 417 U.S. 85 (1974).

88. The Court in *Bellis* explicitly refused to accept the *Boyd* decision as precedent for the proposition that a member of a partnership may assert the privilege to avoid turning over the partnership's documents. *Bellis v. United States*, 417 U.S. 85, 95 n.2 (1974). *Boyd* dealt with the issue of whether the privilege was available to the partners of a glass company to protect them from turning over an invoice which the government had subpoenaed. *Boyd v. United States*, 116 U.S. 616, 618–19 (1886). The Court allowed the fifth amendment privilege to the partners, but did so on the theory that the partners had a proprietary claim to the records superior to that of the government. *Id.* at 628 (quoting *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066–67 (1765)). The *Boyd* Court did not consider the issue of whether the records of a partnership held in a representative capacity were within the scope of the privilege, because the Court settled the matter entirely on the private property theory. See *supra* note 19.

89. *Bellis v. United States*, 417 U.S. 85, 86–87 (1974).

90. Justice Douglas dissented.

91. *Bellis v. United States*, 417 U.S. 85, 100–01 (1974).

natural individuals,⁹² and may not be employed by an individual to avoid production of records which are held in a representative capacity.⁹³ Furthermore, since the documents of organized collective entities do not embody significant elements of personal privacy, they do not require the fifth amendment's protection.⁹⁴ The Court noted, however, that this analysis only made sense in those instances where the "organization . . . is recognized as an independent entity apart from its individual members."⁹⁵ Therefore, while some partnerships, Wall Street law firms for example, may represent organized institutional activity which precludes any claim of a fifth amendment privilege with respect to the entity's documents, the difficult question becomes whether this same result should apply to the small three-member partnership at issue in *Bellis*.⁹⁶

The Court indicated that, while the size of the entity at issue would require it to "explore the outer limits" of the *White* analysis,⁹⁷ the result would not be different. Although the law firm in *Bellis* was certainly small, it was nevertheless a "formal institutional arrangement" with an "established institutional identity independent of its individual partners."⁹⁸ In this respect, the Court noted, the partnership was not different from a corporation. Consequently, the organizational character of the records and the representative aspects of the claimant's possession of them would predominate over any individual's personal interest.⁹⁹ The Court then concluded that the *White* formulation could not be reduced to a simple proposition based solely on the size of the organization,¹⁰⁰ or the form which the organization takes:

Every State has now adopted laws permitting incorporation of professional associations, and increasing numbers of lawyers, doctors, and other professionals are choosing to conduct their business affairs in the corporate form rather than the more traditional partnership. Whether corporation or partnership, many of these firms are independent entities whose financial records will be held by a member of the firm in a representative capacity. In these circumstances, the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise.¹⁰¹

92. *Id.* at 89-90.

93. *Id.* at 89.

94. The Court expressed why records of organizations do not embody elements of personal privacy in the following statement:

[A] substantial claim of privacy or confidentiality cannot often be maintained with respect to the financial records of an organized collective entity. Control of such records is generally strictly regulated by statute or by the rules and regulations of the organization, and access to the records is generally guaranteed to others in the organization. In such circumstances, the custodian of the organization's records lacks the control over their content and location and the right to keep them from the view of others which would be characteristic of a claim of privacy and confidentiality.

Id. at 92.

95. *Bellis v. United States*, 417 U.S. 85, 92 (1974).

96. *Id.* at 94-95.

97. *Id.* at 94.

98. *Id.* at 95.

99. *Id.* at 99-100.

100. *Id.* at 100.

101. *Id.* at 100-01. Notably, the Court expressly declined to follow the impersonality test set out in *White*. *Id.* at 100; see *supra* text accompanying notes 79-84.

The Court conceded, however, that there might be certain circumstances in which this strict interpretation of the collective entity doctrine would not apply.¹⁰² The Court left open the possibility that the representatives of small family partnerships, or of partnerships in which there is a "pre-existing relationship of confidentiality among the partners,"¹⁰³ might be able to assert the privilege successfully. Lower courts, however, have rarely applied this exception.¹⁰⁴

III. THE SUPREME COURT'S SHIFT IN FOCUS IN DOCUMENT PRODUCTION CASES

A. *The Fisher Case*

The rule that a representative of a collective entity could not assert a personal privilege when the entity's documents were sought was well settled at least until 1976 when the Court handed down its decision in *Fisher v. United States*.¹⁰⁵ *Fisher* concerned the documents of a sole-proprietor under investigation by the IRS for possible tax liability. Specifically, the documents in issue were the workpapers of the taxpayer's accountant which the taxpayer had turned over to his attorney in connection with the investigation. An IRS subpoena sought production of the documents from the attorney,¹⁰⁶ who, along with the taxpayer, asserted both the fifth amendment privilege and the attorney-client privilege. The Court noted that the attorney could not assert his client's fifth amendment privilege to avoid turning over documents that were in the attorney's possession.¹⁰⁷ The attorney could, however, assert the attorney-client privilege if the fifth amendment would have protected the documents while they were in the taxpayer's possession.¹⁰⁸ In concluding that the taxpayer would not have been entitled to the privilege, the Court rather rigidly focused on the specific language of the amendment.¹⁰⁹ Thus, under *Fisher*, the amendment's protection will only apply when a communication made by an accused is: 1) compelled, 2) testimonial, and 3) incriminating.¹¹⁰

In this regard the Court reasoned that when the preparation of the documents sought had been wholly voluntary, they could not be said to contain any compelled

102. *Bellis v. United States*, 417 U.S. 85, 100 (1974).

103. *Id.*

104. *In re Grand Jury Subpoena Duces Tecum (Doe)*, 605 F. Supp. 174, 177 (E.D.N.Y. 1985) ("Given the difficulties inherent in satisfying the *Bellis* test, it comes as no surprise that neither the parties nor the Court could discover a reported post-*Bellis* case in which a partner successfully invoked the Fifth Amendment to block access to partnership records."); see also, Annot., 17 A.L.R.4th 1039 (1982).

105. 425 U.S. 391 (1976).

106. *Id.* at 394-95.

107. *Id.* at 398-99.

108. *Id.* at 404.

109. *Id.* at 396-97, 408. Significantly, the Court downplayed the role of privacy as an interest protected by the fifth amendment. *Id.* at 399. Indeed, the Court asserted that it had "never suggested that every invasion of privacy violates the privilege." *Id.*

110. *Id.* at 408. In denying application of the privilege in other contexts, the Court had also focused on the language of the amendment. Thus, the privilege did not apply because there was no testimonial self-incrimination when the state compelled a suspect to give a handwriting sample, *Gilbert v. California*, 388 U.S. 263, 265-67 (1967); to give a voice exemplar, *United States v. Wade*, 388 U.S. 218, 222-23 (1967); or to produce blood, *Schmerber v. California*, 384 U.S. 757, 760-65 (1966).

testimonial evidence.¹¹¹ Consequently, the contents of the documents were not protected by the privilege. The Court then proceeded to consider the "act of producing" the subpoenaed documents, and observed that this act would have "communicative aspects of its own."¹¹² Specifically, the taxpayer in turning over the document would be forced to concede both the existence of the documents and his possession or control of them.¹¹³ Compulsion is therefore clearly present and will give rise to the privilege if it is both testimonial and incriminating.¹¹⁴ This determination, the Court observed, would depend upon the facts and circumstances of the particular case.¹¹⁵ On the basis of the facts in *Fisher*, the Court held that the act of producing the documents would not be sufficiently testimonial and incriminating to give rise to the privilege.¹¹⁶

The Court in *Fisher* took a new approach in analyzing document production cases. Rather than focus on the contents of the documents and the accompanying privacy interests of the claimant,¹¹⁷ which it had done in *Bellis* and *White*,¹¹⁸ the *Fisher* Court focused on the compulsion inherent in answering a grand jury subpoena.¹¹⁹ Consequently, because no compelled testimony is *contained* in voluntarily created documents, the protection of the fifth amendment privilege will apparently have to turn on the compulsion inherent in *producing* the documents.¹²⁰

B. Unresolved Questions

Two questions bearing on the continued validity of the collective entity doctrine remain unresolved after *Fisher*. First, it is not clear what effect the act of production

111. *Fisher v. United States*, 425 U.S. 391, 409-10 (1976). The Court reasoned that, when documents are in the attorney's hands, no compulsion is present because in such a situation compelling the attorney to turn the documents over does not compel the taxpayer to do anything. *Id.* at 397. Furthermore, because the documents were prepared by a person other than the taxpayer (they were prepared by the accountant), the documents would not contain testimonial declarations by that person. *Id.* at 409.

112. *Id.* at 410-11.

113. *Id.* at 410.

114. *Id.*

115. *Id.*

116. *Id.* at 411-13. The Court argued that by complying with the subpoena the taxpayer would only be indicating his belief that the documents are those described in the subpoena, *id.* at 410, an indication which the Court determined would not rise to the level of testimony. *Id.* at 411. Furthermore, the Court emphasized that the existence of the papers was a "foregone conclusion," *id.*, a point which suggests that when the government is unsure of the document's existence or the taxpayer's possession of them a different result might be reached. Finally, the Court concluded that, even if there were some "minimal testimonial significance" associated with turning the documents over, that testimony would certainly not be incriminating. *Id.* at 412. According to the Court, the implied admissions would incriminate sufficiently only if they would serve to authenticate the documents, *id.* at 412 & n.12, an occasion which it concluded would not be likely here. *Id.* at 413.

117. See *supra* note 109.

118. See *supra* text accompanying notes 78 & 94.

119. *Fisher v. United States*, 425 U.S. 391, 396-97, 408 (1976).

120. The Court reserved the question of whether the fifth amendment privilege would be available to an individual who owned and authored the private business documents sought by the subpoena. *Id.* at 414. In reserving this question, the Court cited *Boyd* with apparent approval. *Id.* Some courts have interpreted this as an indication that certain private business documents are protected in themselves regardless of the act of production analysis. See, e.g., *United States v. Davis*, 636 F.2d 1028 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981); *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980). The view expressed in these decisions is that the fifth amendment still has a privacy component. Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: the Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683, 693 (1982). This controversy was resolved to some extent by the Supreme Court in *United States v. Doe*, 465 U.S. 605, 610-12 (1984); see *infra* text accompanying note 133; see also Heidt, *supra* note 19, at 472 n.136.

analysis will have on the collective entity doctrine. The documents at issue in *Fisher* were not, of course, those of a collective entity.¹²¹ Nevertheless, despite the Court's apparent approval of the doctrine at several places in the opinion,¹²² the logic of *Fisher* arguably compels the conclusion that the act of producing the entity's documents would give rise to the privilege in favor of the custodian if sufficiently testimonial and incriminating to that custodian.¹²³ Because the modern collective entity cases focused on the contents of the documents and the validity of an expectation of privacy with regard to those contents,¹²⁴ the Court's shift in focus to an act of production analysis may render the Court's prior collective entity analysis inapplicable.

Second, the Court did not set out a clear example of what it would require for the act of production to rise to the level of testimonial self-incrimination. Because the Court decided that no testimonial self-incrimination was present on the facts in *Fisher*,¹²⁵ lower courts have been left to grapple with the Court's new focus on the act of production without any clear indication of its proper application. Consequently, these courts have not taken a consistent approach to the question, and, as would be expected, their conclusions have varied.¹²⁶

C. The Doe Decision—Continued Uncertainty

Neither of these unresolved questions were answered by the Court in *United States v. Doe*,¹²⁷ the most recent Supreme Court case to deal with document production. In *Doe* a subpoena was served on the owner of a sole-proprietorship demanding the production of certain business records that were in his possession.¹²⁸ The district court granted the owner's motion to quash the subpoena because it determined that the act of producing the documents would involve testimonial self-incrimination.¹²⁹ The Third Circuit affirmed, but did so on the basis of its belief that both the contents and the act of producing the records were testimonial and incriminating.¹³⁰

The Supreme Court reversed the Third Circuit's determination that the contents of the documents were privileged.¹³¹ The Court thus made clear what *Fisher* would seem to demand: The contents of voluntarily created documents are not privileged

121. *Fisher v. United States*, 425 U.S. 391, 394 nn.2-3 (1976).

122. *See id.* at 408, 413 & n.14.

123. *See, e.g., In re Grand Jury Matter (Brown)*, 768 F.2d 525, 528 (3d Cir. 1985).

124. *Id.* at 528 n.2.

125. *See supra* text accompanying note 116.

126. Compare *In re Grand Jury Proceedings*, 626 F.2d 1051 (1st Cir. 1980) (allowing the privilege) and *In re Special Grand Jury No.1*, Empanelled Dec. 1977 Term, 465 F. Supp. 800 (D.Md. 1978) (allowing the privilege) with *United States v. Schlansky*, 709 F.2d 1079 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984) (denying the privilege) and *In re Grand Jury Empanelled on January 17, 1980*, 505 F. Supp. 1041 (D.N.J. 1981) (denying the privilege). *See generally* Heidt, *supra* note 19.

127. 465 U.S. 605 (1984).

128. *Id.* at 606-07.

129. *In re Grand Jury Empanelled March 19, 1980*, 541 F. Supp. 1 (D.N.J. 1981).

130. *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3d Cir. 1982).

131. *United States v. Doe*, 465 U.S. 605, 611-12 (1984).

because they do not contain compelled testimonial evidence.¹³² After *Doe* this lack of privilege obtains even when the documents sought, unlike in *Fisher*, are created by the claimant and are in the claimant's possession.¹³³ The Court, however, affirmed the circuit court's holding that the act of producing the documents was privileged and could only be compelled with a grant of use immunity.¹³⁴

However, after *Doe*, the standard by which the Court determines whether an act of production is sufficiently testimonial and incriminating remains unclear. In *Doe* the Court simply deferred to the district court's factual determination of the issue, with which the Third Circuit had agreed, without making any comments on the legal basis of those determinations.¹³⁵ Presumably, then, lower courts are given wide discretion to resolve this issue in any way they like, and, so long as it cannot be said that their determinations have "no support in the record,"¹³⁶ they will not be disturbed on appeal. Furthermore, like *Fisher*, *Doe* did not involve the records of a collective entity. Thus, it remains unclear whether the new focus is to apply at all to such entities.

IV. THE CIRCUIT COURTS' VIEWS OF THE COLLECTIVE ENTITY DOCTRINE AFTER *FISHER* AND *DOE*

A. The Majority Rule

A majority of federal courts that have considered document production issues since *Fisher* have continued to apply the collective entity doctrine.¹³⁷ The view of these courts is that while *Fisher*, and later *Doe*, changed the analysis when personal records were sought from an individual or sole-proprietorship, those cases did not alter the analysis when organizational records were sought.¹³⁸ Consequently, the entity itself as well as the representative acting in an official capacity may not rely on the fifth amendment privilege to avoid turning over documents.

132. *Id.* at 610.

133. *Id.* at 611–12. The Court thus resolved the issue left open in *Fisher* as to whether the privilege would be available to an individual who owned and authored private documents sought by a subpoena. *See supra* note 120.

134. *Id.* at 613–14.

135. *Id.*

136. *Id.* at 614.

137. *See In re Grand Jury Proceedings (Doe)*, No. 86–4922, slip op. (5th Cir. March 31, 1987) (LEXIS, Genfed library, App file); *United States v. Vallance*, 793 F.2d 1003, 1005–06 (9th Cir. 1986); *In re Grand Jury Subpoena* (85–W–71–5), 784 F.2d 857, 861 (8th Cir.), *cert. dismissed*, 107 S. Ct. 918 (1987); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.), *cert. denied*, 106 S. Ct. 594 (1985); *In re Grand Jury Subpoena (Lincoln)*, 767 F.2d 1130, 1131 (5th Cir. 1985); *In re Kave*, 760 F.2d 343, 357 n.30 (1st Cir. 1985); *Butcher v. Bailey*, 753 F.2d 465, 471 n.9 (6th Cir.), *cert. dismissed*, 106 S. Ct. 17 (1985); *United States v. Centennial Builders*, 747 F.2d 678, 684 (11th Cir. 1984); *United States v. Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 943–45 (10th Cir.), *cert. denied*, 469 U.S. 819 (1984); *In re Grand Jury Empanelled March 8, 1983*, 722 F.2d 294, 296 (6th Cir. 1983), *cert. dismissed*, 465 U.S. 1085 (1984); *Bionic Auto Parts & Sales, Inc. v. Fahner*, 721 F.2d 1072, 1083 (7th Cir. 1983); *Heinold Hog Mkt., Inc. v. McCoy*, 700 F.2d 611, 613 (10th Cir. 1983); *United States v. Harrison*, 653 F.2d 359, 361–62 (8th Cir. 1981); *United States v. MacKey*, 647 F.2d 898, 900 (9th Cir. 1981); *United States v. Alderson*, 646 F.2d 421, 422–23 (9th Cir. 1981); *United States v. Davis*, 636 F.2d 1028, 1042 (5th Cir.), *cert. denied*, 454 U.S. 8621 (1981); *In re Grand Jury Proceedings United States*, 626 F.2d 1051, 1053 (1st Cir. 1980).

138. *See, e.g., In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 943–44 (10th Cir.), *cert. denied*, 469 U.S. 819 (1984).

These courts base their decisions on the Supreme Court's unvarying adherence to the collective entity doctrine,¹³⁹ as well as the language in *Fisher* approving that doctrine.¹⁴⁰ Moreover, these courts view *Bellis* and *White* as stirring reiterations of these principles, and frequently cite those cases for the proposition that the privilege is purely personal and may not be exercised by the representative of a collective group.¹⁴¹

The Sixth Circuit is representative of the courts that have continued to summarily deny fifth amendment protection to collective entities and their representatives.¹⁴² The court demonstrated this most recently in *In re Grand Jury Proceedings (Morganstern)*.¹⁴³ In that case the court, sitting en banc, refused to allow the representatives of several corporations and partnerships to invoke the fifth amendment to avoid turning over the entities' documents.¹⁴⁴ Relying on *Bellis* and *White*, the court observed:

It is a truism that the privilege against compulsory self-incrimination is a personal one. No collective entity may claim it. Since collective entities can act only through officers and agents, the effect of permitting custodians of partnership and corporate records to avoid production of such records in reliance on the Fifth Amendment would be to extend the privilege . . . to the collective entities. The custodian . . . acts only in a representative capacity, not as an individual, and production of the records is not a testimonial act of the custodian. Production of the records communicates nothing more than the fact that the one producing them is a representative of the corporation or partnership.¹⁴⁵

The court's conclusion that the production of entity records is not a testimonial act of the custodian prompted the court to go another step and, in effect, warn the Government that any attempt at trial to implicate the custodian on the basis of the testimonial-free act of production would be subject to a motion to suppress.¹⁴⁶ Apparently, the court was assuming that in the collective entity context the representative's act of producing documents is by definition testimony-free. If, however, the Government attempted to add testimonial value to the act of production, the court would step in and prohibit the Government from doing so.¹⁴⁷

While this approach addresses the dilemma of the document custodian who is fearful that the act of providing corporate documents will later be used to incriminate the custodian, it is not required by *Fisher*. The Supreme Court's decision in *Curcio*

139. See, e.g., *In re Grand Jury Empanelled March 8, 1983*, 722 F.2d 294, 296 (6th Cir. 1983), cert. dismissed, 465 U.S. 1085 (1984).

140. *Id.*

141. See, e.g., *United States v. MacKey*, 647 F.2d 898, 900 (9th Cir. 1981).

142. See *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir.), cert. denied, 106 S. Ct. 594 (1985); *Butcher v. Bailey*, 753 F.2d 465 (6th Cir.), cert. dismissed, 106 S. Ct. 17 (1985); *In re Grand Jury Empanelled March 8, 1983*, 722 F.2d 294 (6th Cir. 1983), cert. dismissed, 465 U.S. 1085 (1984).

143. 771 F.2d 143 (6th Cir.), cert. denied, 106 S. Ct. 594 (1985).

144. *Id.* at 148.

145. *Id.*

146. *Id.*

147. *Id.* The Eighth Circuit recently adopted this view. *In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857 (8th Cir.), cert. dismissed, 107 S. Ct. 918 (1987). The Third Circuit, on the other hand, has expressly rejected this position. *In re Special Federal Grand Jury Empanelled October 31, 1985*, No. 87-5209, slip op. (3d Cir. May 20, 1987).

v. *United States*,¹⁴⁸ which was approved in *Fisher*,¹⁴⁹ as well as language in *Fisher* itself, supports this assertion. In *Curcio* a unanimous Court held that a custodian of union records could not be required, on the basis of the *White* rule, to testify orally as to the whereabouts of those records.¹⁵⁰ The Court believed that requiring oral testimony of this kind forced the custodian to disclose the contents of his mind.¹⁵¹ As for document production, however, the Court reaffirmed the validity of the collective entity doctrine.¹⁵²

This reaffirmation is significant because it occurred despite the Court's explicit recognition that a custodian's act of producing documents "is itself a representation that the documents produced are those demanded by the subpoena."¹⁵³ Indeed, the *Curcio* Court found no problem with requiring the custodian to identify and authenticate the documents, because such an act would merely be "auxiliary to the production,"¹⁵⁴ and would subject the custodian to "little, if any, further danger of incrimination."¹⁵⁵

Fisher, of course, expressly recognized what was implicit in *Curcio*—that the act of production may have testimonial aspects.¹⁵⁶ Further, when the records are those of a sole-proprietor or individual, *Fisher* and *Doe* allow this implied testimony to trigger the fifth amendment privilege if the testimony is sufficiently incriminatory. This will be the case, the Court observed in *Fisher*, if the implied admissions serve to authenticate the documents.¹⁵⁷ In the collective entity context, however, *Fisher* approves the *Curcio* analysis:

In these [collective entity] cases compliance with the subpoena is required even though the books have been kept by the person subpoenaed *and his producing them would itself be sufficient authentication to permit their introduction against him*.¹⁵⁸

Clearly, the Court acknowledges a different rule when the records of a collective entity are involved. In those kinds of cases, it does not matter if the custodian's act of producing documents is testimonial or incriminating, because the custodian's personal privilege to avoid incrimination does not extend to the documents of an entity that are held in a representative capacity. Indeed, as the Court noted in *Fisher*, production may not be avoided in the collective entity context even though such production serves to authenticate the documents and enables the Government to later introduce them against the custodian. Thus, the Sixth Circuit's practice of prohibiting the Government's use of testimony inherent in the act of production is not consistent with what the *Fisher* Court understood the rule to be in collective entity cases.¹⁵⁹

148. 354 U.S. 118 (1957).

149. *Fisher v. United States*, 425 U.S. 391, 410, 413 (1976).

150. *Curcio v. United States*, 354 U.S. 118, 123-24 (1957).

151. *Id.* at 128.

152. *Id.* at 122-23.

153. *Id.* at 125.

154. *Id.*

155. *Id.* See also *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 537-38 (3d Cir. 1985) (Garth, J., dissenting).

156. *Fisher v. United States*, 425 U.S. 391, 410 (1976).

157. *Id.* at 410-13; see *supra* text accompanying notes 112-16 and 134.

158. *Fisher v. United States*, 425 U.S. 391, 413 n.14 (1976) (emphasis added).

159. This conclusion is buttressed by the fact that the first Sixth Circuit case to define this limitation concerned the

B. *The Second Circuit's View*

The Second Circuit's decisions in this area present a view somewhat related to that of the majority.¹⁶⁰ Generally, this circuit will not allow the fifth amendment privilege to be asserted by the representative of a collective entity.¹⁶¹ This position is based on the long line of precedent supporting the collective entity doctrine.¹⁶² In certain circumstances, however, the circuit has been persuaded to sway from the doctrine.¹⁶³

In *In re Grand Jury Subpoenas Duces Tecum (Saxon Industries)*,¹⁶⁴ the court applied the act of production analysis to prevent the government from compelling the production of corporate records from a former officer of a corporation who had taken the records without authorization.¹⁶⁵ Moreover, in *In re Katz*,¹⁶⁶ the court held that an individual could claim the fifth amendment privilege on the basis of the act of production doctrine when the subpoena of corporate records is directed to that individual.¹⁶⁷ In the court's view, the subpoenas in these two cases compelled the claimants to personally produce and authenticate corporate documents.¹⁶⁸ Because this act of production was held to be self-incriminatory, the subpoenas were contrary to *Fisher*.¹⁶⁹

The controlling factor in these decisions was that neither subpoena gave the corporation an option to appoint someone to produce the records who would not be incriminated by the act of production.¹⁷⁰ Indeed, the Second Circuit has made clear that when the subpoena is directed to the corporation there will be no circumstances under which the fifth amendment will allow the documents to be withheld, because the corporation has no privilege.¹⁷¹ If the corporate custodian would incriminate him or herself by producing the records—a situation which the circuit characterizes as

records of an individual taxpayer, not those of a collective entity. *United States v. Schlansky*, 709 F.2d 1079, 1083 (6th Cir. 1983).

160. See *supra* text accompanying notes 137–59. The Fourth and Eleventh Circuits have recently followed the Second Circuit's approach. See *United States v. Lang*, 792 F.2d 1235 (4th Cir.), *cert. denied*, 107 S. Ct. 574 (1986); *In re Grand Jury No. 86-3 (Will Roberts Corp.)*, 816 F.2d 569 (11th Cir. 1987).

161. See, e.g., *In re Two Grand Jury Subpoenas Duces Tecum*, 793 F.2d 69, 72 (2d Cir. 1986); *United States v. Sancetta*, 788 F.2d 67, 73 (2d Cir. 1986); *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 45–46 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986); *In re Two Grand Jury Subpoenas Duces Tecum*, 769 F.2d 52, 56 (2d Cir. 1985); *In re Grand Jury Subpoenas Duces Tecum (Saxon Indus.)*, 722 F.2d 981, 984–85 (2d Cir. 1983).

162. See, e.g., *In re Two Grand Jury Subpoenas Duces Tecum*, 769 F.2d 52, 56 (2d Cir. 1985).

163. See *United States v. Barth*, 745 F.2d 184 (2d Cir.), *cert. denied*, 470 U.S. 1004 (1984); *In re Grand Jury Subpoenas Duces Tecum (Saxon Indus.)*, 722 F.2d 981 (2d Cir. 1983); *In re Katz*, 623 F.2d 122 (2d Cir. 1980).

164. 722 F.2d 981 (2d Cir. 1983).

165. *Id.* at 986–87.

166. 623 F.2d 122 (2d Cir. 1980).

167. *Id.* at 125–26.

168. See *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 46 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986); *In re Two Grand Jury Subpoenas Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985).

169. See *In re Two Grand Jury Subpoenas Duces Tecum*, 769 F.2d 52, 59 (2d Cir. 1985).

170. *Id.*

171. *United States v. Sancetta*, 788 F.2d 67, 74 (2d Cir. 1986); *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 46–47 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986); *In re Two Grand Jury Subpoenas Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985); *In re Grand Jury Subpoenas Duces Tecum (Saxon Indus.)*, 722 F.2d 981, 986 (2d Cir. 1983).

unusual¹⁷²— the corporation must appoint some other employee to produce the records.¹⁷³ If such an employee cannot be found, the corporation must appoint an outside agent who has no previous connection with the corporation that would make the testimonial act of production incriminating.¹⁷⁴

While this construction of the *Fisher* decision might seem reasonable on the facts of *Saxon Industries* and *In re Katz*, it is not consistent with the principle that the representative of a collective entity may not assert a personal privilege when an entity's records are sought. The circuit's consistent support for *Bellis* and *White* is puzzling since the practical result of its analysis often will be contrary to the specific language of those decisions.¹⁷⁵ Indeed, the court's analysis would logically seem to require an act of production evaluation in virtually every situation in which the subpoena is directed to a custodian, and the custodian asserts that the act of production would be incriminating. Such a result was surely not contemplated in *Bellis*, as *Fisher* itself implicitly observed.¹⁷⁶

Furthermore, the Second Circuit's practice of allowing another employee or an outside agent to produce the records in the "unusual circumstance" where the custodian's act of production would be incriminating is not a workable solution, particularly in the case of a professional corporation with one or few shareholders. In such a situation, another employee will usually not exist to produce the records, and if one does exist, he or she will likely raise the same objection to production as the person originally subpoenaed. Moreover, if an agent or another employee is appointed, the act of directing the agent or employee to the records sought by the subpoena may itself be an implicit admission by the custodian that these are the records demanded and that they are in the custodian's possession or control. The better rule, and one easier of application, is that set out in the long line of collective entity cases and endorsed in *Fisher*: A representative of a collective entity does not have a fifth amendment privilege to avoid turning over the entity's documents even though the documents themselves or the act of producing them would incriminate the representative personally.

172. *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 47 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986).

173. *Id.* at 47.

174. *Id.*

175. See *supra* text accompanying notes 70–75 and 89–101. The Fourth Circuit characterized the Second Circuit's approach as the "most reasonable," and recently adopted it as the rule in that circuit:

We agree with the Second Circuit's approach. The basic rule of *Bellis* continues after *Doe*, and normally a corporate representative or agent cannot claim a fifth amendment privilege against producing corporate documents. There will be rare occasions where an individual's production of those documents may amount to testimonial self-incrimination. In those limited circumstances, the individual has a personal fifth amendment privilege, but the corporation must comply with the summons through some other person.

United States v. Lang, 792 F.2d 1235, 1240–41 (4th Cir. 1986). See also *In re Grand Jury No. 86-3* (Will Roberts Corp.), 816 F.2d 569 (11th Cir. 1987) (per curiam).

176. *Fisher v. United States*, 425 U.S. 391, 413 n.14 (1976); see also *supra* text accompanying notes 158–59.

C. The Third Circuit's View

The logical fulfillment of the Second Circuit's reasoning is demonstrated in two recent decisions of the Third Circuit.¹⁷⁷ In *In re Grand Jury Matter (Brown)*,¹⁷⁸ the Third Circuit held that the sole shareholder of a one-person professional corporation may assert the fifth amendment privilege when a subpoena directed to that one person seeks the corporation's records.¹⁷⁹ In *Brown* the court held that the act of producing the records of his accounting corporation would compel Brown to make testimonial communications that would be self-incriminating.¹⁸⁰ Therefore, the court concluded, *Fisher* and *Doe* require that he not be held in contempt for refusing to produce the records absent either a grant of use immunity by the government or a finding that there is no likelihood of self-incrimination.¹⁸¹

A few months later a panel of the circuit strengthened *Brown*.¹⁸² In *In re Grand Jury Empaneled*,¹⁸³ the court refused to accept the Government's contention that *Brown* turned on the wording of the particular subpoena at issue there. The Government relied on Judge Becker's concurrence in *Brown*, which had suggested that the subpoena was invalid because it involved testimonial incrimination beyond that inherent in the act of production.¹⁸⁴ Rejecting the Government's argument, the court held that *Brown* stood for the "broader proposition that a custodian of corporate records who is subpoenaed to produce them cannot be held in contempt for failure to do so if he demonstrates that such production would in fact tend to incriminate him."¹⁸⁵

The circuit's decisions are based on the view that, after *Fisher* and *Doe*, the significant factor in determining the availability of the privilege is neither the nature of the entity nor the contents of the documents, but rather "the communicative or noncommunicative nature of the arguably incriminating disclosures sought to be compelled."¹⁸⁶ Indeed, the *Brown* court dismissed the contention that the *Doe* holding applies only to the records of a sole-proprietorship,¹⁸⁷ and distinguished *Bellis* on the grounds that it concerned the contents of the collective entity's documents, and not the "often incriminatory nature of the act of production."¹⁸⁸ The court stated that "the holdings in *Fisher* and *Doe* render untenable any suggestion that *Bellis* would require a custodian to produce documents where the act of production is both communicative and incriminatory."¹⁸⁹

177. *In re Grand Jury Empanelled*, 773 F.2d 45 (3d Cir. 1985); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985). A third case expressing this view was decided by a panel of the Third Circuit on May 20, 1987. *In re Special Federal Grand Jury Empanelled* October 31, 1985, No. 87-5209, slip op. (3d Cir. May 20, 1987).

178. 768 F.2d 525 (3d Cir. 1985).

179. *Id.* at 529. In a very recent case, the Fifth Circuit reached a contrary result. *In re Grand Jury Proceedings (Doe)*, No. 86-4922, slip op. (5th Cir. March 31, 1987) (LEXIS, Genfed library, App file).

180. *Id.* at 528.

181. *Id.*

182. *In re Grand Jury Empanelled*, 773 F.2d 45 (3d Cir. 1985).

183. 773 F.2d 45 (3d Cir. 1985).

184. See *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 531 (3d Cir. 1985) (Becker, J., dissenting).

185. *In re Grand Jury Empanelled*, 773 F.2d 45, 47 (3d Cir. 1985).

186. *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 528 (3d Cir. 1985).

187. *Id.*

188. *Id.* at 528 n.2.

189. *Id.*

The Third Circuit attempts to align its decisions with the standard collective entity cases by asserting that the records of corporations must still be maintained and can be compelled by a subpoena addressed to the *corporation*.¹⁹⁰ Indeed, the Second Circuit accepted this distinction as justification for the Third Circuit's decision in *Brown*.¹⁹¹ This distinction ignores, however, the long line of Supreme Court cases holding that the representative of a corporation may not assert a personal fifth amendment privilege when the records of the entity are sought, regardless of whether the documents will incriminate the representative personally, and regardless of whether the subpoena is addressed to the corporation or to the particular representative.¹⁹²

Nevertheless, it might be argued that there is justification for the Third Circuit allowing the sole shareholder of a professional corporation to assert his or her personal fifth amendment privilege when the records of such entity are sought. A professional corporation is not substantially different from a sole-proprietorship in the degree of personal interest in the business which the shareholder/owner possesses. Indeed, it might be argued that it is putting form over substance to allow the sole-proprietor in *Doe* to assert the privilege while denying it to the sole shareholder in *Brown*. These arguments are not, however, the basis of the Third Circuit's holding in *Brown*.¹⁹³ The court did not attempt to craft an exception to the collective entity rule for the documents of a professional corporation based upon the professional corporation's similarity to a sole-proprietorship.¹⁹⁴ Rather, that court relied upon an interpretation of *Fisher* and *Doe* which departed from the well-settled principles of the collective entity doctrine.¹⁹⁵

The Supreme Court has not directly addressed the issue of the applicability of the fifth amendment privilege to the records of a professional corporation. Nonetheless, the rationale of *Bellis* and other collective entity cases suggests that the professional corporation should not be treated differently than any other artificial entity.¹⁹⁶ Moreover, even the suggestion in *Bellis* that the members of a small family partnership

190. *Id.*

191. *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 47 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986).

192. *See e.g.*, *Dreier v. United States*, 221 U.S. 394 (1911) (discussed *supra* at text accompanying notes 44-45) and *Grant v. United States*, 227 U.S. 74 (1913).

193. *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 532 (3d Cir. 1985) (Garth, J., dissenting).

194. *Id.*

195. *See supra* text accompanying notes 190-92. Indeed, the Fifth Circuit recently rejected the Third Circuit's view in *In re Grand Jury Proceedings (Doe)*, No. 86-4922, slip op. (5th Cir. March 31, 1987) (LEXIS, Genfed library, App file), a case, like *Brown*, involving a one-person corporation. The court stated:

In *Bellis*, the [Supreme] Court defined a collective entity as "an organization which is recognized as an independent entity apart from its individual members." The Court reaffirmed this definition of collective entity in *Doe*. The law of Mississippi is clear that a corporation is a creature of law, with a legal identity separate and distinct from that of its owners. And the Supreme Court noted in *Bellis* that corporations, no matter how small, are collective entities. Accordingly, Braswell's contention that his one "man" corporations are not collective entities must fail.

Thus, "no privilege can be claimed by the custodian of corporate records regardless of how small the corporation may be." *Bellis*, 417 U.S. at 100.

Id. (citations omitted).

196. *See supra* text accompanying notes 100-01.

might be able to assert the privilege¹⁹⁷ does not imply that it should also be available to the sole shareholder of a professional corporation. The corporation is a creature of the state, a fact that does not vary depending upon the corporation's size. In choosing to do business in the corporate form, the shareholder of the professional corporation has been granted by the state certain rights and privileges not available to the sole-proprietor,¹⁹⁸ and as such has no complaint when the state compels the production of the corporation's documents over the shareholder's fifth amendment claim.

V. CONCLUSION

The Third Circuit's decisions are rather remarkable in light of the consistent support which the collective entity doctrine has received in the Supreme Court.¹⁹⁹ Specifically, that circuit deemphasizes the wisdom of allowing the visitatorial powers of the state to predominate in document production cases involving corporations over any individual claim to the fifth amendment privilege. This wisdom was articulated by the Court as long ago as 1906 in *Hale v. Henkel*,²⁰⁰ and has never been overruled or supplanted by the Court. Furthermore, the Third Circuit ignores the holding of the Court in *Bellis* that the applicability of the collective entity doctrine should not depend upon the size of the organization or upon the form which the entity takes, but rather upon the organizational character of the records and the representative capacity of the claimant.²⁰¹ Indeed, *Bellis* is cited with approval in both *Fisher* and *Doe*.²⁰² Finally, since both *Fisher* and *Doe* involved the records of an individual sole-proprietor,²⁰³ the Third Circuit's reliance on those cases as precedent in the collective entity context is dubious.

The Second Circuit, and most recently the Fourth and Eleventh Circuits,²⁰⁴ while generally adhering to the doctrine and thus refusing to allow the representatives of collective entities to assert the privilege to avoid document production, have departed from that position in limited circumstances. These departures are based on the view that, while the collective entity can never refuse to produce documents, the custodian can refuse if the normally testimonial-free act of production happens to be incriminatory. In such cases the corporation must appoint someone to produce the records who will not be incriminated by the act of production.

The majority view, represented in the decisions of the Sixth Circuit, follows most closely the precise commands of the collective entity doctrine. Under this view there are two lines of authority in document production cases: the *Fisher/Doe* line and

197. See *supra* text accompanying notes 102-04.

198. See *supra* text accompanying notes 38-39.

199. See *supra* text accompanying notes 62-104.

200. 201 U.S. 43 (1906).

201. *Bellis v. United States*, 417 U.S. 85, 100-01 (1974); see *supra* text accompanying note 71.

202. *Fisher v. United States*, 425 U.S. 391, 411-13 & n.14 (1976); *United States v. Doe*, 465 U.S. 605, 608 (1984).

203. *Fisher v. United States*, 425 U.S. 391, 394 & n.3 (1976); *United States v. Doe*, 465 U.S. 605, 606 (1984).

204. See *supra* notes 160 & 175.

the collective entity line. The two lines do not cross. *Fisher* and *Doe* control when the records sought are the personal records of the person subpoenaed. In the collective entity context, however, *Bellis* and *White* provide the analysis. Thus, the representative of a collective entity cannot look to *Fisher* and *Doe* for authority to invoke the fifth amendment privilege when the documents of the entity are sought.

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